

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals
for the District of Columbia Circuit
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,296

FILED MAY 20 1964

Nathan J. Paulson
CLERK

JEFFERSON RADIO COMPANY, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

W. D. FRINK, tr/as JEFFERSON RADIO COMPANY,
PERMITTEE OF STATION WIXI, IRONDALE, ALABAMA,

Intervenor.

No. 18,297

JEFFERSON RADIO COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA
AND FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

W. D. FRINK, tr/as JEFFERSON RADIO COMPANY,
PERMITTEE OF STATION WIXI, IRONDALE, ALABAMA,

Intervenor.

Appeal and Petition
from the Federal Communications Commission

(i)

I N D E X

	<u>Record Page</u>	<u>Page</u>
Prehearing Stipulation		1
Prehearing Order		2
Memorandum Opinion and Order, December 9, 1963	1132	3
Memorandum Opinion and Order, December 19, 1963	1144	5
Memorandum Opinion and Order, December 30, 1963	1246	7

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

JEFFERSON RADIO COMPANY, INC.)	
Appellant)	
)	
v.)	Case No. 18296
)	
FEDERAL COMMUNICATIONS)	
COMMISSION)	
)	
Appellee)	
JEFFERSON RADIO COMPANY, INC.)	
Petitioner)	
)	
v.)	Case No. 18297
)	
UNITED STATES OF AMERICA and)	
)	
FEDERAL COMMUNICATIONS)	
COMMISSION)	
)	
Respondents)	

STIPULATION

The parties have agreed that the above-captioned cases present the following issues on appeal:

1. Whether the Commission erred in ordering the termination of the instrument of authorization of Station WIXI without previously considering appellant-petitioner's assignment application on its merits.
2. Whether the Commission erred in ordering that appellant-petitioner's assignment application could not be amended.

The parties agree that the printed Joint Appendix will be filed one week after the Reply Briefs are filed. The parties will cooperate in designation of the Joint Appendix.

References in the Briefs to material in the Joint Appendix will be made by identifying pages in the Record on Appeal, and the Joint Appendix will contain the record pages as well as its pagination.

/s/ Ruth V. Reel

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Commission

/s/ Lionel Kestenbaum

Counsel for United States of America

/s/ Henry R. Goldstein

Counsel for Jefferson Radio Company,
Inc.

/s/ Maurice R. Barnes

Counsel for W. D. Frink
tr/as Jefferson Radio Company

January 21, 1964

PREHEARING ORDER

Counsel for the parties in the above-entitled cases having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in these cases unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: January 23, 1964

[R. 1132]

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D. C. 20554

In re Application of)

W.D. Frink, tr/as)

JEFFERSON RADIO COMPANY (WIXI))

DOCKET NO. 14455

File No. BL-8187

For License to Cover Construction)

Permit BP-10672 authorizing a new)

standard broadcast station at)

Irondale, Alabama)

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners Lee, Ford and Cox absent.

1. The Commission has under consideration (a) Commission Decision, September 13, 1963 (35 FCC 331, 24 RR 1033), and (b) Memorandum Opinion and Order, December 2, 1963 (FCC 63-1079). The former document denied the application of W. D. Frink for license to cover construction permit, and the latter denied a petition for reconsideration. In the existing posture of the case, Station WIXI must cease operation at 3:00 a.m. Central Standard Time, December 11, 1963. The Petition for Extension of Authorization currently under consideration, filed by W. D. Frink on December 5, 1963, seeks extension of time of operation until January 10, 1964 in order that an agreement for assignment of construction permit and sale of physical assets may be amended and processed in an orderly manner.

2. Petitioner has shown no good cause for further extension of time. He has been on notice since September 13, 1963 of the Commission's adverse decision and was, at that time, given three months to wind up his affairs. However, the Commission, on its own motion, will grant an extension in view of the fact that our Memorandum Opinion and Order denying reconsideration was not released until December 2, 1963.

It should, however, be noted that the extension is solely for the purpose of winding up, the application for assignment of construction permit having been rendered moot by our denial of the application for license. In re Superior Broadcasting Company (FCC 62-63, 22 RR 847). For this reason, any subsequent amendment to the application for assignment will not be accepted for filing.

[R. 1133] ACCORDINGLY, IT IS ORDERED, This 6th day of December, 1963, that the Petition for Extension of Authorization, filed December 5, 1963, by W. D. Frink, IS DENIED: and

IT IS FURTHER ORDERED, That the effective date of the Commission's Decision of September 13, 1963, above referred to, IS CHANGED to 3:00 a.m. Central Standard Time, January 1, 1964.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: December 9, 1963

[R. 1144]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Cox not participating.

1. The Commission has under consideration a number of pleadings filed on December 6, 1963.¹ These were filed subsequent to issuance of our Memorandum Opinion and Order released December 2, 1963 (FCC 63-1079) and prior to issuance of our Memorandum Opinion and Order released December 9, 1963 (FCC 63-1125). The latter Memorandum Opinion and Order denied a Petition for Extension of Authorization filed by W. D. Frink, but on the Commission's own motion changed the effective date of the Commission's Decision of September 13, 1963, to 3:00 a.m. Central Standard Time, January 1, 1964. We also noted therein that such extension was solely for the purpose of winding up Frink's affairs, that the application for assignment of construction permit had been rendered moot by our denial of Frink's application for license, and that, therefore, any subsequent amendment to the application for assignment would not be accepted for filing.

^{1/} Filed on December 6, 1963, were (a) Petition for Reconsideration and (b) Request for Stay by W. D. Frink tr/as Jefferson Radio Company; and (c) Request for Stay and (d) Petition for Reconsideration by Jefferson Radio Company, Inc. Oppositions to the pleadings by the Broadcast Bureau were filed on December 13, 1963. The parties informally advised the Commission that they would not file reply pleadings.

[R. 1145]

2. Frink's Request for Stay will be denied. It is predicated solely on the proposition that the period of time between release of our Memorandum Opinion and Order denying reconsideration (December 2, 1963) and the date on which he must cease operation (December 11, 1963), is inconsistent with the 30-day provision of 47 USC 402(c). This argument has no merit. Although providing for a 30-day period for filing a notice of appeal, § 402(c) fails to indicate that such period bears any relation

to the effective date of a Commission order or decision. In fact § 402(c) provides that the Court may grant temporary relief and that orders granting such relief may permit either "the maintenance of the status quo . . . or the restoration of a position or status terminated or adversely affected [emphasis supplied]" Thus, § 402(c) contemplates that the effective date of a Commission order may fall within the 30-day appeal period. Moreover, inasmuch as our Memorandum Opinion and Order released December 9, 1963, changed the effective date of our decision to January 1, 1964, we note that the period of time between our order denying reconsideration and the time within which Frink must now cease operation is substantially the same as the time for appeal provided in § 402(c).

3. Frink's Petition for Reconsideration will also be denied inasmuch as our Memorandum Opinion and Order released December 2, 1963, denied a petition for reconsideration by Frink and such denial fully satisfies the requirements of 47 USC 405. Frink is entitled to no more since there must be some finality to the administrative process, and, absent extraordinary circumstances (not here present), the Commission's decision on the petition for reconsideration exhausts Frink's administrative remedies. Atlantic City Broadcasting Company (WLDB), FCC 61-964, 21 RR 194(a).

4. With respect to the request for stay filed by Jefferson Radio Company, Inc. to permit action regarding the assignment application, as noted in paragraph 1, supra, such application has been rendered moot by our various orders herein and, therefore, the request for stay will be denied. The Petition for Reconsideration of Jefferson Radio Company, Inc., has been carefully compared with the joint request for extension of authorization filed December 5, 1963, by Frink and petitioner, Jefferson Radio Company, Inc., and disposed of in our Memorandum Opinion and Order released December 9, 1963. Since the instant petition presents no grounds not fully considered by the Commission

in the Memorandum Opinion and Order of December 9th, it will be denied for the same reasons.

[R. 1146]

ACCORDINGLY, IT IS ORDERED, This 18th day of December, 1963, that the above-described petitions for reconsideration and requests for stay ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released:
December 19, 1962

[R. 1246]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners Bartley and Cox absent.

1. The Commission has under consideration: (a) Request for Stay, filed December 27, 1963, by Jefferson Radio Company, Inc., and (b) Petition for Reconsideration, Remand and Reopening of Hearing for Further Proceedings and Request for Temporary Authority, filed December 27, 1963, by Jefferson Radio Company, Inc. The various requests are addressed to the state of affairs described briefly in paragraph 2, infra.

2. The Commission takes note of: (a) Commission Decision, September 13, 1963 (35 FCC 331, 24 RR 1033); (b) Memorandum Opinion and Order, December 2, 1963 (FCC 63-1079); (c) Memorandum Opinion and Order, December 6, 1963 (FCC 63-1125); and (d) Memorandum Opinion and Order, December 19, 1963 (FCC 63-1155). The effect of the several documents described has been to deny the application of W. D. Frink for license to cover construction permit of Station WIXI, Irondale, Alabama, to deny a petition of Frink's for reconsideration of the Commis-

sion Decision, to deny a petition of Frink's for extension of time (granting, however, on the Commission's own motion a partial extension), and to deny several requests for stay and reconsideration by Frink and Jefferson Radio Company, Inc. In the present posture of the matter, Station WIXI must cease broadcast activities at 3:00 a.m. Central Standard Time, January 1, 1964.

3. It is to be noted at the outset that petitioner's rights, if any, are under a contract relationship with W. D. Frink whose application for license to cover construction permit was denied (par. 2(a), supra). Frink and petitioner were originally applicants for facilities at Irondale and Bessemer, Alabama which were mutually exclusive. Petitioner eventually entered a contract with Frink whereby petitioner would dismiss his conflicting application (making possible the grant to Frink) in return for an option to buy stock in a to-be-formed Frink/Newman corporation (petitioner herein). Frink was thereupon to prosecute the unopposed application to a conclusion and then seek to assign the license to a to-be-formed corporation. Newman was to dispose of his interests in Bessemer Broadcasting Company to avoid overlap problems. Thereafter, "Newman [would] have the right to obtain a one-half ownership interest in the station authorized . . . upon proper

[R. 1247]

approval by the Commission of his acquisition of an interest in the station for which Frink is granted an authorization." The contract is set forth in more detail at 35 FCC 336, 353-355. Contrary to petitioner's assertion, the Commission did not approve the agreement in the sense claimed by petitioner, i.e., an implied in futuro grant. As pointed out by the Hearing Examiner, 29 FCC 897, "the provisions of the rule [Section 1.363] required a determination as to whether grant should issue to Jefferson and whether Bessemer's application should be dismissed in light of the Frink-Newman agreement." The basic purpose of the Commission's Rule was to assure that the payment or other consideration for dismissal does not exceed out-of-pocket expenses. It is from this

standpoint that the agreement was reviewed. The Commission in no manner approved in futuro any proposed assignment to the Frink-Newman corporate entity "to be formed." Indeed, as pointed out above, the contract itself recognized that an assignment application would have to be filed and approved by the Commission. It is further to be noted (35 FCC 354, par. 10) that Frink covenanted "not [to] take any unusual action which would have the effect of defeating the contract rights of Newman...."

4. Thereafter,¹ certain activities, misrepresentations, transfers of control, etc. by Frink came to the attention of the Commission and caused Frink's application for license to be designated for hearing. For reasons set forth at length in our Decision (35 FCC 331-356), it was found that Frink had been guilty of unauthorized transfers of control, misrepresentations, etc. and was not qualified to be a Commission licensee, Frink's application for license to cover construction permit was denied, and his authorization has been ordered terminated.

5. Petitioner contends that the acceptance by the Commission of his present application for assignment conferred rights upon him stemming from 47 USC 310(b) requiring the Commission to hold a hearing on the assignment application. We do not agree. It is clear that Newman's status is merely that of a potential assignee. Such contract rights as Newman may have had were entirely contingent, the contingency being that Frink have an authorization to assign. Frink's authorization has been terminated. Although petitioner's inchoate contract rights as against Frink may have ripened, such contract rights absent a valid authorization held by Frink accord petitioner no standing to require us to hold a hearing on an application for assignment of a non-existent authorization. Clearly, Section 310(b) presupposes the existence of construction permit or license.

¹ On December 19, 1959 the Newman-Frink contract was signed. On February 5, 1960, the Hearing Examiner's Initial Decision (29 FCC 888) was issued, granting Frink's application for construction permit, and dismissing Bessemer's application at Bessemer's request, and the Commission Decision (29 FCC 873) followed on October 12, 1960, affirming

the Initial Decision. The construction permit issued on October 14, 1960. Frink applied for license on November 25, 1960, and commenced operation based upon a program test authorization on

(Continued on R. 1248)

[R. 1248] continued

December 5, 1960. The subject application for assignment (File No. BAP-514) was filed with the Commission on January 10, 1961. After investigation, etc., the application of Frink for a license to cover the construction permit was designated for hearing on December 28, 1961 (27 F.R. 23), and action upon the subject assignment application was deferred pending the outcome of the hearing on the license application.

[R. 1249]

Petitioner similarly claims that he has been deprived of a right under 47 CFR 1.522 (old 47 CFR 1.311) to amend his application to show that the potential transferee (Jefferson Radio Company, Inc.) will have no participation by W. D. Frink and/or his wife. While such rule does recite that "Any application may be amended as a matter of right ...", such rule presupposes that there exists something for which application may be made. By definition, one may not apply for assignment of a terminated construction permit and our statement in the Memorandum Opinion and Order of December 9, 1963 (par. 2(c), supra) to the effect that no amendment would be accepted does nothing more than recognize a legal actuality.

6. Petitioner takes issue with the fact that, during the entire course of the lengthy hearing on Frink's application for license (December 28, 1961 - September 11, 1963) he was in no way put on notice that his potential assignee status was being placed in jeopardy. The Commission's actions in this regard were matters of public notice, including the order of designation, the notice of hearing dates, the hearing held in Birmingham, the Initial Decision and the Commission's Decision. For him to claim that he was unaware that his potential assignee status was endangered appears to border on the absurd. Despite the public notices of all of these official documents, at no time prior to or during the pen-

dency of these proceedings, did petitioner make any effort to intervene or be heard. He cannot claim such rights at the eleventh hour.

7. As a matter of public interest, the Commission has examined the need for broadcast service and the damage which may result from the termination of Frink's station. Frink's station WIXI, while nominally an Irondale, Alabama station is, in fact, a Birmingham urbanized area station (29 FCC 886). The service area of Frink's existing operation is served by 10-17 other stations (29 FCC 885). We see no harm to the public from termination of this facility.

8. We have treated petitioner's contentions at some length. However, we are bound to note in addition that it is clear that he seeks reconsideration of a series of actions culminating in the Memorandum Opinion and Order of December 19, 1963 (par 2(c), supra). As to the actions antecedent to December 19, 1963, we disposed of them in our Memorandum Opinion and Order referred to. Since the Memorandum Opinion and Order of December 19, 1963, disposed of a petition for reconsideration filed by this petitioner (as distinguished from Frink) he has exhausted his administrative remedies. Atlantic City Broadcasting Company (WLDB), FCC 61-964, 21 RR 194(a).

[R. 1250] ACCORDINGLY, IT IS ORDERED, This 30th day of December, 1963, That the Petition for Stay and the Petition for Reconsideration [and other relief], filed by Jefferson Radio Company, Inc. on December 27, 1963, ARE DENIED; and

IT IS FURTHER ORDERED, That the application of Jefferson Radio Company, Inc. for assignment of a construction permit (BAP-514) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

Released: December 30, 1963



BRIEF FOR APPELLANT-PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,296

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v.

FEDERAL COMMUNICATIONS COMMISSION,

W. D. FRINK, tr/as JEFFERSON RADIO COMPANY,
PERMITTEE OF STATION WIXI, IRONDALE, ALABAMA,

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Appellee,

Intervenor.

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FILED MAR 30 1964

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Respondents,

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PERMITTEE OF STATION WIXI, IRONDALE, ALABAMA,

Intervenor.

Appeal and Petition
from the Federal Communications Commission

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(i)

STATEMENT OF QUESTIONS PRESENTED

The parties have agreed that these cases raise the following questions:

1. Whether the Commission erred in ordering the termination of the instrument of authorization of Station WIXI without previously considering Appellant-Petitioner's assignment application on its merits.
2. Whether the Commission erred in ordering that Appellant-Petitioner's assignment application could not be amended.

I N D E X

	<u>Page</u>
JURISDICTIONAL STATEMENT	2
STATEMENT OF THE CASE	2
STATUTE INVOLVED	9
STATEMENT OF POINTS	9
SUMMARY OF ARGUMENT	9
ARGUMENT:	
I. The Termination of the Instrument of Authorization of Station WIXI Without Previously Considering Appellant's Assignment Application on Its Merits Was Erroneous	10
II. The Refusal of the Commission To Allow Appellant To Amend Its Assignment Application Was Erroneous	13
CONCLUSION	14

TABLE OF CASES

Cases:

Ashbacker Radio Corporation v. Federal Communications Commis- sion, 326 U.S. 327, L.Ed. 108 (1945)	12
* Churchill Tabernacle v. Federal Communications Commission, 81 U.S. App. D.C. 411, 160 F.2d 244 (1947)	9, 10, 11, 12
Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134, 84 L.Ed. 656 (1940)	12, 14
Independent Broadcasting Company v. Federal Communications Commission, 89 U.S. App. D.C. 396, 193 F.2d 900 (1951)	11
L. B. Wilson, Inc. v. Federal Communications Commission, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948)	12

Statutes:

Communications Act of 1934, as amended, 47 U.S.C. 151:

Section 308	11, A-1
Section 309	12, A-2
Section 309(e)	12, A-2
Section 310(b)	11, A-3

* Case chiefly relied upon.

Rules and Regulations:**Rules and Regulations of the Federal Communications Commission,
28 Fed. Reg. 12,385:**

Section 1.522(a)	13, A-3
Section 1.522(b)	13, A-4

Miscellaneous:

Greater Princeton Broadcasting Co., 22 Pike and Fischer RR 977 (1962)	13
Jefferson Radio Company, 20 Pike and Fischer RR 851 (1960)	11

United States Court of Appeals

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Appeal and Petition
from the Federal Communications Commission

BRIEF OF APPELLANT-PETITIONER

JURISDICTIONAL STATEMENT

These are consolidated cases appealing from a Memorandum Opinion and Order of the Federal Communications Commission, adopted and released December 30, 1963; a Memorandum Opinion and Order released December 19, 1963; and a Memorandum Opinion and Order released December 9, 1963. The effect of these actions was to order the cancellation of the instrument of authorization under which standard broadcast Station WIXI, Irondale, Alabama, was operating, and dismissal of Appellant's pending application for assignment thereof.

Appellant-Petitioner's "Notice of Appeal" and "Petition For Review" were filed December 31, 1963 pursuant to the provisions of Section 402(a), 402(b) and 402(c) of the Communications Act of 1934, as amended, 66 Stat 718 (1952), 47 U.S.C.A. 402(a)(b)(c)(Supp. 1962), the provisions of Sections 2 and 3 of the Judicial Review Act of 1950, 64 Stat, 1129 (1950), 5 U.S.C.A. 1032, 1033 (Supp. 1962) and Rule 37 of the Rules of this Court.

STATEMENT OF THE CASE

Appellant is an applicant before the Federal Communications Commission, requesting the assignment to it of the instrument authorizing the operation of standard broadcast Station WIXI, Irondale, Alabama.

This appeal is from a Memorandum Opinion and Order of the Commission adopted and released December 30, 1963, a Memorandum Opinion and Order released December 19, 1963 and a Memorandum Opinion and Order released December 9, 1963 (R. 1246-1250; 1144-1146; 1132-1133). These actions by the Commission ordered the cancellation of the instrument of authorization Appellant seeks assigned to it without having given consideration to Appellant's application; denied Appellant's request to amend the application for assignment; denied Appellant's application; and dismissed the assignment application without a hearing.

The proceedings leading to the action complained of in this appeal

commenced in 1956 when the Commission had before it the mutually exclusive proposals of W. D. Frink, tr/as Jefferson Radio Company (Intervenor) and the Bessemer Broadcasting Company, Incorporated (controlled by one Dorsey Eugene Newman) requesting construction permit for a standard broadcast station with the same facilities at Irondale and Bessemer, Alabama, respectively. Intervenor requested authorization for a new station at Irondale and Bessemer (Newman) requested a construction permit to change frequency and power of its existing station at Bessemer. Only one of the mutually-exclusive proposals could be granted. Following extensive hearings and proceedings before the Commission and a remand to the Hearing Examiner for further hearing, the applicants agreed to resolve their differences and to merge their respective interests in the ownership and operation of a new station to be constructed at Irondale and to dismiss the Bessemer proposal.

The agreement between Intervenor and Newman, entered into on December 19, 1959, providing for a merger of interests, was filed with the Commission on December 21, 1959. The agreement recognized that it would be necessary for Newman to dispose of his existing station at Bessemer before he would be permitted by the Commission to acquire an ownership interest in the proposed new station at Irondale. Accordingly, provision was made in the December 19, 1959 agreement for Newman to sell his existing Bessemer station as a condition precedent to acquisition of a one-half interest in the proposed new station at Irondale.

An amendment of Intervenor's application submitting the merger agreement and the terms of the agreement were accepted and approved by the Hearing Examiner on February 9, 1960. Subsequently, on October 14, 1960 the Hearing Examiner's Initial Decision granting the Irondale application, approving the merger agreement of December 19, 1959, and approving dismissal of the conflicting Bessemer application was adopted and approved by the Commission.

Subsequently, the Commission approved Newman's sale of his Bessemer station to comply with the merger agreement with Intervenor.

Following the sale of Newman's station at Bessemer an application was filed with the Commission on January 10, 1961 requesting consent to the assignment of instrument of authorization for the Irondale station (Radio Station WIXI) from Intervenor to a newly-formed corporation, Jefferson Radio Company, Inc. (Appellant herein) (R. 1199-1245). The assignment application reflected the arrangements previously approved by the Hearing Examiner and by the Commission under which Newman and his wife would have a one-half interest in the corporation owning and operating Station WIXI, with the remaining one-half interest to be held by W. D. Frink and his wife.

In the meantime, the construction of physical facilities of Station WIXI at Irondale had been completed and on November 25, 1960 an application was filed with the Commission requesting a license to cover the construction permit (R. 1-12). Upon the filing of the latter application showing completion of construction the Commission, on December 2, 1960, authorized broadcast operation of Station WIXI to be commenced while the license application was being processed.

Thus, at all times since January 10, 1961 the Commission has had pending before it and available for consideration two applications requesting authorizations with respect to Station WIXI at Irondale, namely, the license application and the application for assignment.

However, before the pending application to assign WIXI was acted upon, the Commission, by action taken December 20, 1961, designated for hearing Intervenor's application for license to cover construction permit. That Order of Designation also made another application for a new station at Centreville, Alabama, in which Mr. Frink was a fifty percent partner, a party to the proceeding.¹ Among the issues in the hearing were two concerning the Centreville application, including a determination of qualifications of Mr. Frink or his partner to be a Commission

¹ Fred H. Davis and W. D. Frink, d/b as Voice of the Mid South, File No. BP-14110.

licensee. Those and other issues on the two applications involved transactions between Mr. Frink and parties other than Mr. Newman. The Commission did not consolidate Appellant's pending assignment application for hearing with the license application and did not name either Mr. Newman or Appellant as a party-respondent in the proceedings (R. 13-16). On August 6, 1962, after all of the testimony was taken and all of the exhibits received, the Centreville applicant filed a petition to amend its application, remove it from the hearing and return it to the processing line. That request was granted and the applicant was permitted to amend so that Mr. Frink was no longer a part of the applicant and his former partner's application could be processed outside of the hearing in progress (R. 117-118). On September 13, 1963, the Commission denied Intervenor's application for license which remained in hearing and ordered the station to cease operation on December 11, 1963 (R. 772-774). A petition to reconsider the decision denying Intervenor's license application was denied on December 2, 1963 (R. 1111-1114) and Station WIXI was ordered to cease operation after the close of business on December 10, 1963.

A joint "Petition For Extension Of Authorization" was filed with the Commission by Intervenor and Appellant on December 5, 1963 which, among other things, called attention to the still-pending assignment application (R. 1116-1121). In view of the Commission's adverse findings and conclusions regarding Frink's qualifications as a broadcast licensee the petition pointed out that action was being taken to amend the assignment application so as to transfer all ownership interests therein to Newman and his wife and to remove Frink and his wife from participation. The petition stated further that the amendment would include an agreement showing that Appellant would acquire ownership of the technical properties of WIXI for a price which reflected an arms-length transaction based upon the present estimated value of such equipment. The Commission was advised that there was to be no reimbursement to Frink for any right, title or interest in the construction permit or other authoriza-

tion for Station WIXI. Likewise, a lease agreement to provide for use of the premises would be negotiated on a similar arms-length basis and it would be demonstrated in the amendment that the lease agreement for the realty would not include any provision for reimbursement to Frink for any right, title or interest he may have in the station authorization (R. 1116-1121). In brief, any consideration moving to Frink would be solely for the purchase of station equipment and for use of premises.

In the aforesaid joint petition of December 5, 1963, the Commission also was advised that additional time would be required to complete the preparation and filing of the amendment of the assignment application and to permit the orderly review and processing thereof by the Commission. Therefore, the Commission was requested to extend the operating authorization of Station WIXI from December 11, 1963 to January 10, 1964. In support of that request, it was shown that the extension requested not only would permit the preparation and filing of an amendment to the assignment application, but would enable the program service now being provided by Station WIXI to be continued without interruption. Also, the Commission was advised that Station WIXI presently has a staff of sixteen full-time and part-time employees whose employment would be permitted to continue pending resolution of the pending assignment application and the amendment thereof.

The joint petition of December 5, 1963 also requested the Commission to note that Dorsey Eugene Newman, principal party in the proposed assignee corporation (Appellant) acting in reliance on the agreement of December 19, 1959, had caused his application for construction permit at Bessemer, Alabama, to be dismissed with the approval of the Hearing Examiner and the Commission and that subsequently, pursuant to Commission approval, he had sold his Bessemer station in order to satisfy a condition precedent before he could acquire his one-half interest in Station WIXI. However, before the pending assignment application could be acted upon, other problems developed regarding transactions between W. D. Frink and other persons as a result of which the Commission had

taken action with respect to the WIXI authorization which, if made finally effective, would delete the authorization to be assigned.

On December 6, 1963, while the Joint Petition of December 5, 1963, was still pending, separate Petitions for Reconsideration and separate Petitions for Stay were filed by Appellant and Intervenor (R. 1122-1125). Those pleadings reiterated the showing made in the December 5, 1963 joint pleading requesting an extension of the authorization in order to afford the parties an opportunity to amend the pending assignment application to reflect arrangements to transfer all interest in the assignment application to Newman, the withdrawal of Frink therefrom, and to permit the assignment application to be considered by the Commission.

In a Memorandum Opinion and Order released December 9, 1963 denying the jointly filed "Petition For Extension Of Authorization," the Commission pointedly avoided any mention of Appellant and ignored its showing that it was a party in interest with respect to the proceedings on the WIXI license application (R. 1132-1133). However, without identifying Appellant as an applicant and as the party in interest, the Commission did mention that the "Petition For Extension of Authorization" sought extension of time in order that an agreement for assignment of construction permit and sale of physical assets may be submitted and the assignment application amended and processed in an orderly manner. With respect thereto, the Commission stated " . . . any subsequent amendment to the application for assignment will not be accepted for filing" (R. 1132-1133). However, the Commission on its own motion extended the operating authorization of Station WIXI from December 11 to 3:00 A.M. on January 1, 1964, which would silence the station after sign-off at time of local sunset on December 31, 1963. In connection with the extension the Commission stated that it should " . . . be noted that the extension is solely for the purpose of winding up . . . " The Commission therein for the first time stated that the application for assignment of construction permit was rendered moot by the denial of the application for license (R. 1132-1133). The latter statement was the first indi-

cation that the Commission did not intend to give consideration to Appellant's assignment application pending before it since January 10, 1961.

Later, on December 19, 1963, the Commission released a "Memorandum Opinion and Order" denying the separate petitions for reconsideration and the separate petitions for stay filed December 6, 1963 on behalf of Intervenor and on behalf of Appellant (R. 1144-1146). The Commission therein reaffirmed its previous rulings that the extension of operating authorization of Station WIXI to January 1, 1964 " . . . was solely for the purpose of winding up Frink's affairs, that the application for assignment of construction permit has been rendered moot by our denial of Frink's application for license, and that, therefore, any subsequent amendment to the application for assignment would not be accepted for filing" (R. 1144-1146).

Appellant filed still another petition with the Commission on December 27, 1963 requesting reconsideration of the denial of Intervenor's application, a remand and reopening of the hearing and temporary authority to operation Station WIXI pending any further consideration of its and Intervenor's applications (R. 1153-1164). Attached to that petition was an agreement entered into by the Frinks and Newmans on December 26, 1963 reflecting all of the transactions necessary to effect the amendment to Appellant's application that would remove the Frinks (R. 1160-1163). Appellant made it clear to the Commission in that petition it was ready to proceed in a manner that would keep Station WIXI on the air and preserve the rights of Mr. Newman. On December 30, 1963 the Commission released a further Memorandum Opinion and Order denying Appellant's request and dismissed its application (R. 1246-1250). Once again Appellant was denied the opportunity to amend its application to reflect, among other things, the withdrawal of W. D. Frink and Mrs. W. D. Frink as principals, which would have paved the way for a grant of the assignment.

The instant proceedings were filed with this Court on December 31, 1963. After oral argument on Appellant's Petition For Stay, this Court granted that petition.

STATUTE INVOLVED

The statute involved in this appeal is the Communications Act of 1934, as amended. The pertinent provisions thereof are printed in the Appendix to this brief.

STATEMENT OF POINTS

The termination of the instrument of authorization of Station WIXI without previously considering Appellant's assignment application on its merits was erroneous.

The refusal of the Commission to allow Appellant to amend its assignment application was erroneous.

SUMMARY OF ARGUMENT

By a series of actions the Commission has denied an application requesting license for a new broadcast station and has ordered the station to cease operation. Also, erroneously, it has dismissed Appellant's application requesting assignment of the station's operating authority and refused to receive an amendment to Appellant's assignment application that would protect rights which were created with the Commission's encouragement. Thus, the Commission has refused to consider Appellant's application on its merits, dismissed the application, destroyed Appellant's rights and denied the public of a broadcast service without any attempt to determine whether there is a means by which these elements can be preserved. Churchill Tabernacle v. Federal Communications Commission, 81 U.S. App. D.C. 411, 160 D. 2d 244 (1947).

ARGUMENT

I. The Termination of the Instrument of Authorization of Station WIXI Without Previously Considering Appellant's Assignment Application on Its Merits Was Erroneous.

Appellant submits that it was entitled to a hearing on the merits of its assignment application before it was summarily dismissed by the Commission to determine whether it would not be more in the public interest to explore the possibilities of granting that application than to cause Station WIXI to cease operation. Churchill Tabernacle v. Federal Communications Commission, 81 U.S. App. D.C. 411, 160 F.2d 244 (1947).

Appellant filed its application requesting the assignment of the operating authorization for Station WIXI after the Commission had granted the construction permit for the station and before it had designated for hearing the application for license to cover the construction permit. The assignment was filed with the full expectation that the license would be granted in a routine manner and assigned to Appellant. When the Commission did designate the license application for hearing, it did not make Appellant or Dorsey Eugene Newman a party to the proceeding, nor did it indicate Appellant's rights in its pending application were in jeopardy. Moreover, the assignment application was filed with encouragement from the Commission as the end result of a means of settling a litigation between two mutually exclusive applicants. In sanctioning the merger which led to that settlement and Appellant's pending assignment application the Commission said:

* * *

"8. The parties' efforts to merge so as to avoid a lengthy time-consuming hearing are certainly understandable and there is nothing about the arrangements and contemplated transactions between the parties which would reflect adversely either upon Jefferson or Bessemer. The agreement hereinabove detailed is, in our judgment, con-

sistent with the public interest, convenience and necessity. Therefore, we conclude that the public interest would be served by grant of the Jefferson application and dismissal of the Bessemer application." Jefferson Radio Company, 20 Pike and Fischer, RR 851, 855 (1960).

In order to satisfy all of the facets of the merger and be in a position to file the resultant application for assignment, Mr. Dorsey Eugene Newman, owner of the Bessemer station had to effectuate the sale of that facility. Upon final Commission approval of that sale, he (Mr. Newman) was free to enter into the Appellant corporation which seeks authorization to acquire Station WIXI. Now Mr. Newman finds himself having complied with all the terms of his agreement, having sold his station at Bessemer and being told by the Commission that it has determined, without a hearing, that Appellant's application is to be dismissed and Mr. Newman's rights are to be destroyed.

As previously stated, the assignment application was filed in good faith before Intervenor's license application was designated for hearing and was not used as a ploy or means of recovery for the holder of a broadcast authorization who was found to be unqualified. Independent Broadcasting Company v. Federal Communications Commission, 89 U.S. App. D.C. 396, 193 F.2d 900 (1951). Appellant submits it is entitled to the same degree of fairness this Court decreed in the Churchill Tabernacle case, supra, when it said at 247:

* * *

" . . . that valuable rights and investments . . . should not be destroyed except for the most compelling reasons."

* * *

Section 310(b) of the Communications Act of 1934, as amended, provides that an assignment application is to be disposed of in the same manner as any applicant for a facility coming under Section 308 of the Act. 47 U.S.C.A. 308, 310(b) (Supp. 1963). In turn, applications to which Section 308 of the Act applies are entitled to full consideration under Section

309 of the Act. 47 U.S.C.A. 308, 309 (Supp. 1963). The latter section of the Communications Act provides that the Commission is authorized to grant an application without hearing upon a showing that the public interest, convenience and necessity would be served thereby. Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327, 90 L. Ed. 108 (1945). However, Section 309(e) of the Act states that the Commission shall formally designate applications for hearing when it is unable to make the statutory finding or a substantial and material question of fact is presented. 47 U.S.C.A. 309(e) (Supp. 1963). Appellant was not made a party to the original hearing and its application has now been dismissed without a determination of whether or not the public interest might not have best been served through a means that would keep Station WIXI on the air. This Court has said " . . . An essential element of due process is an opportunity to be heard before judgment." L. B. Wilson, Inc. v. Federal Communications Commission, 83 U.S. App. D.C. 176, 185, 170 F.2d 793, 802 (1948). It is only too clear that all of the Appellant's and Mr. Newman's private interests have been destroyed without his having had an opportunity to be heard. The Commission has broad discretion in how it proceeds in determining the issuance of broadcast licenses, however, it must protect private as well as public interests. Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134, 138, 84 L.Ed. 656, 659 (1940). The only way Appellant and the public can get the protection to which they are fully entitled is for the Commission to either grant the assignment application without hearing or to hold a hearing on the merits of its application and " . . . exhaust all possible avenues . . . before requiring complete destruction . . . " of Mr. Newman's and Appellant's interest. Churchill Tabernacle, supra, at 248.

II. The Refusal of the Commission To Allow Appellant To Amend Its Assignment Application Was Erroneous.

The Rules and Regulations of the Commission specifically provide that an application may be amended as a matter of right at any time prior to the time it is designated for hearing. Section 1.522(a), 28 Fed. Reg. 12,435 (1963); Greater Princeton Broadcasting Co., 22 Pike and Fischer, RR 977 (1962). Appellant requested an opportunity to amend its application to eliminate the participation of Mr. Frink but that opportunity was denied.

When Intervenor's application for license was designated for hearing the Commission did make another application in which Mr. Frink was a fifty percent partner a party to the proceeding.² There were two specific issues in the order of designation directed toward the Centreville application and its principals. R. 13-16. After all of the evidence was in the record on those applications, the Centreville applicant filed a petition requesting that it be allowed to amend its application so as to eliminate Mr. Frink from the partnership and clear itself for grant. This request was granted, the amendment allowed and the application was taken from the hearing and made available for processing. R. 117.

The Commission's Rules require a showing of good cause by an applicant when it desires to amend after its proposal has been designated for hearing. Section 1.522(b), 28 Fed. Reg. 12,435 (1963). Appellant does not question the showing of good cause or the propriety of allowing the Centreville amendment. What it does question is the grant of this request to amend where it was necessary to show special circumstances and the denial of Appellant's subsequent request that it be given time to prepare an amendment directed toward accomplishing the identical purposes as the one filed by Centreville. In both instances, the desire was to eliminate Mr. Frink from the pending application and by so doing

² Hereinafter referred to as "Centreville."

eliminate whatever cloud may have been over the respective proposal. The effect of both amendments would be to preserve the private rights of the other parties to the applications and the public right to receive the broadcasts of the proposed facilities. Federal Communications Commission v. Pottsville Broadcasting Company, supra. The Commission's denial of the opportunity for Appellant to amend was part and parcel of its denial of Appellant's application. Appellant submits it is entitled to the right to amend its application; to receive consideration of its amended application on its merits; and to a hearing on its application as amended, in the event the amended application is not granted without hearing.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the action of Appellee in dismissing Appellant's application without a hearing was erroneous as was Appellee's refusal to allow Appellant to amend its application, and the Court should set aside the action of the Commission denying Intervenor's application and order that the authorization to operate Station WIXI continue until the Commission has given the application of Appellant full consideration on its merits and that the Commission receive and accept Appellant's amendment to its assignment application.

Respectfully submitted,

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March 25, 1964

A P P E N D I X

A. STATUTES —

Communications Act of 1934, as amended, 47 U.S.C. 151:

Applications for Licenses; Conditions in Licenses for Foreign Communications

Sec. 308. (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by its: provided, that (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the non-broadcast services, that it would not be feasible to secure renewal applications from existing licenses or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: provided further, that the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, tech-

nical and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such licenses revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

Action Upon Applications;
Form of and Conditions Attached to Licenses

Sec. 309(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such applications, and, if the Commission, upon examination of such an application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

(e) If, in the case of any application to which subsection (a) of the section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are notified by the Commis-

sion of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Limitation on Holding and Transfer of Licenses

Sec. 310(b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under Section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

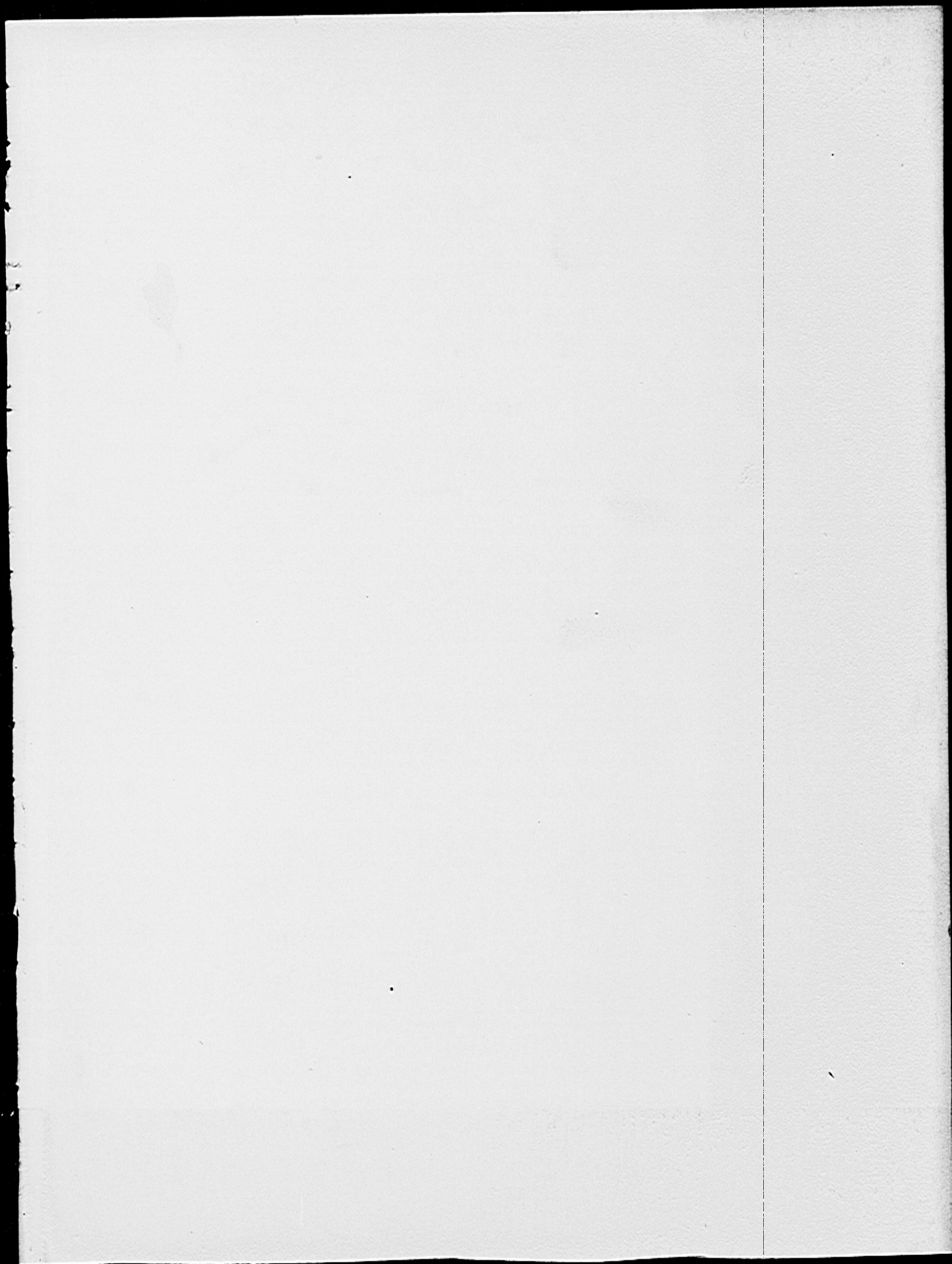
B. RULES AND REGULATIONS, FEDERAL COMMUNICATIONS COMMISSION

§ 1.522 Amendment of Applications

(a) Subject to the provisions of §§ 1.525 and 1.580, any application may be amended as a matter of right prior to the adoption date of an or-

der designating such application for hearing, merely by filing the appropriate number of copies of the amendments in question duly executed in accordance with § 1.513. However, Sec. § 1.571(j) for the effect of certain amendments to standard broadcast applications.

(b) Requests to amend an application after it has been designated for hearing will be considered only upon written petition properly served upon the parties of record in accordance with § 1.47 and, where applicable, compliance with the provisions of § 1.525, and will be granted only for good cause shown. In the case of requests to amend the engineering proposal in standard broadcast applications (other than to make changes with respect to the type of equipment specified), good cause will be considered to have been shown only if, in addition to the usual good cause considerations, it is demonstrated that (1) the amendment is necessitated by events which the applicant could not reasonably have foreseen (e.g. notification of a new foreign station or loss of transmitter site by condemnation); (2) the amendment could not reasonably have been made prior to designation for hearing; and (3) the amendment does not require an enlargement of issues or the addition of new parties to the proceeding.



BRIEF FOR APPELLEE-RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,296

JEFFERSON RADIO COMPANY, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

W. D. FRINK, tr/as JEFFERSON RADIO COMPANY,
Intervenor.

No. 18,297

JEFFERSON RADIO COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

W. D. FRINK, tr/as JEFFERSON RADIO COMPANY,
Intervenor.

ON APPEAL FROM AND PETITION FOR REVIEW OF
MEMORANDUM OPINIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 14 1964

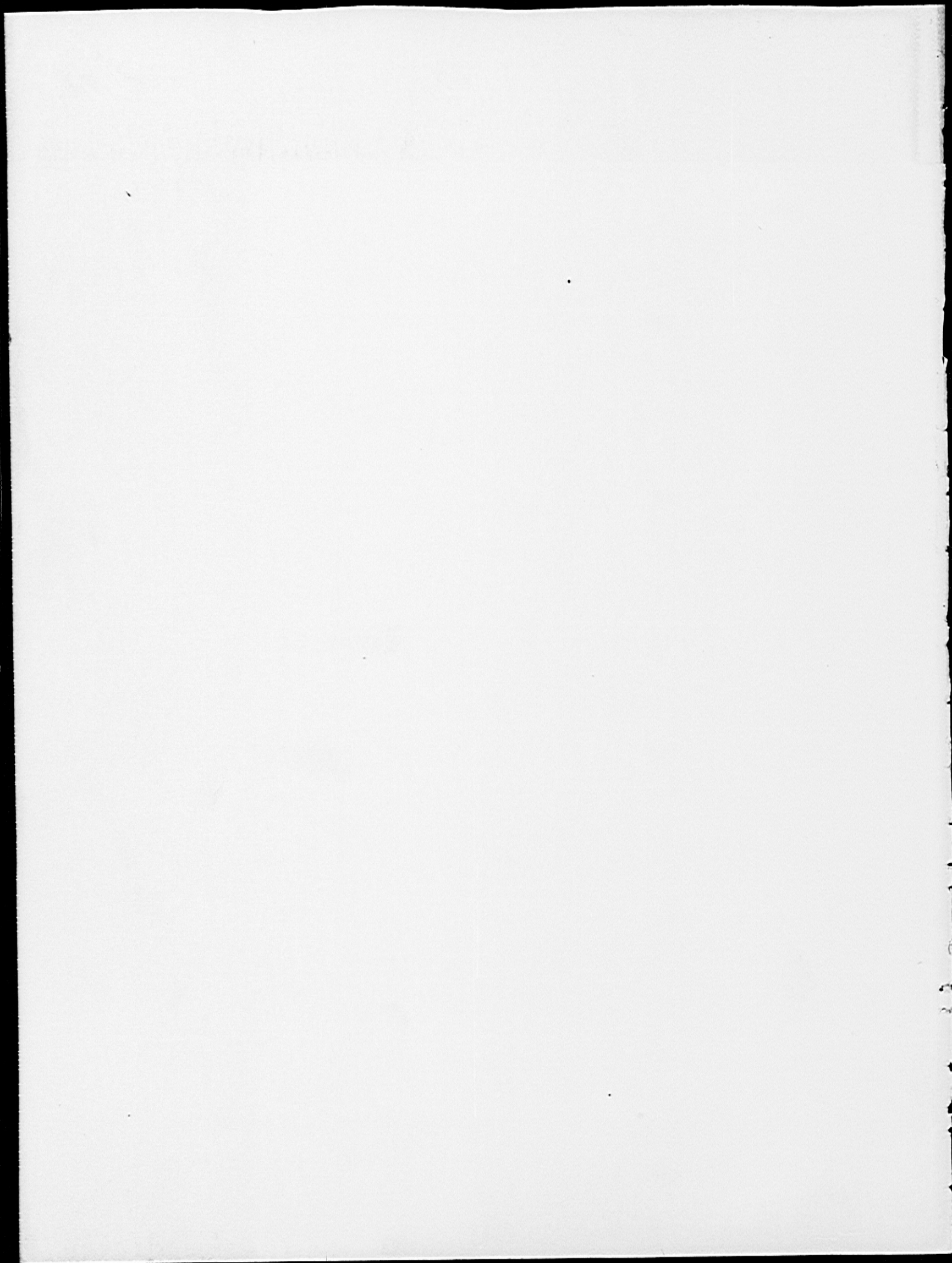
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Federal Communications Commission
Washington, D.C. 20554



STATEMENT OF QUESTIONS PRESENTED

The questions presented, as agreed to by the parties in a stipulation approved by the Court on January 23, 1964 are as follows:

1. Whether the Commission erred in ordering the termination of the instrument of authorization of Station WIXI without previously considering Appellant-Petitioner's assignment application on its merits.
2. Whether the Commission erred in ordering that Appellant-Petitioner's assignment application could not be amended.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF QUESTIONS PRESENTED	(i)
JURISDICTIONAL STATEMENT	1
COUNTERSTATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	8
1. The Commission Properly Dismissed Without Hearing Appellant's Appli- cation To Transfer The Permit For Station WIXI.	8
CONCLUSION	13

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<p><u>*Bendix Aviation Corp., Bendix Aviation Div. v. Federal Communications Commission</u>, 106 U.S. App. 304, 272 F.2d 533, <u>cert. den. Aeronautical Radio Inc. v. United States</u>, 361 U.S. 965 (1960)</p>	8
<p><u>Churchill Tabernacle v. Federal Communications Commission</u>, 81 U.S. App. D.C. 411, 160 F.2d 244 (1947)</p>	11,12
<p><u>Federal Communications Commission v. Broadcasting Service Organization, Inc.</u>, 337 U.S. 901 (1949)</p>	9
<p><u>Logansport Broadcasting Corp. v. United States</u>, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954)</p>	8
<p><u>Rhode Island Television Corp. v. Federal Communications Commission</u>, -- U.S. App. D.C. --, 320 F.2d 762 (1963)</p>	2
<p><u>Transcontinent Television Corp. v. Federal Communications Commission</u>, 113 U.S. App. D.C. 384, 308 F.2d 339 (1962)</p>	8

(ii)

Administrative Decisions:

Page

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9

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1292 (1950)

9

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R.R. 653 (1962)

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12

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Communications Act of 1934, as amended, 48
Stat. 1064, 47 U.S.C. 151 et seq:

Section 310(b)

10

Section 319(c)

4

Section 402(a)

2

Section 402(b)

2

Section 405

12

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10

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2

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10

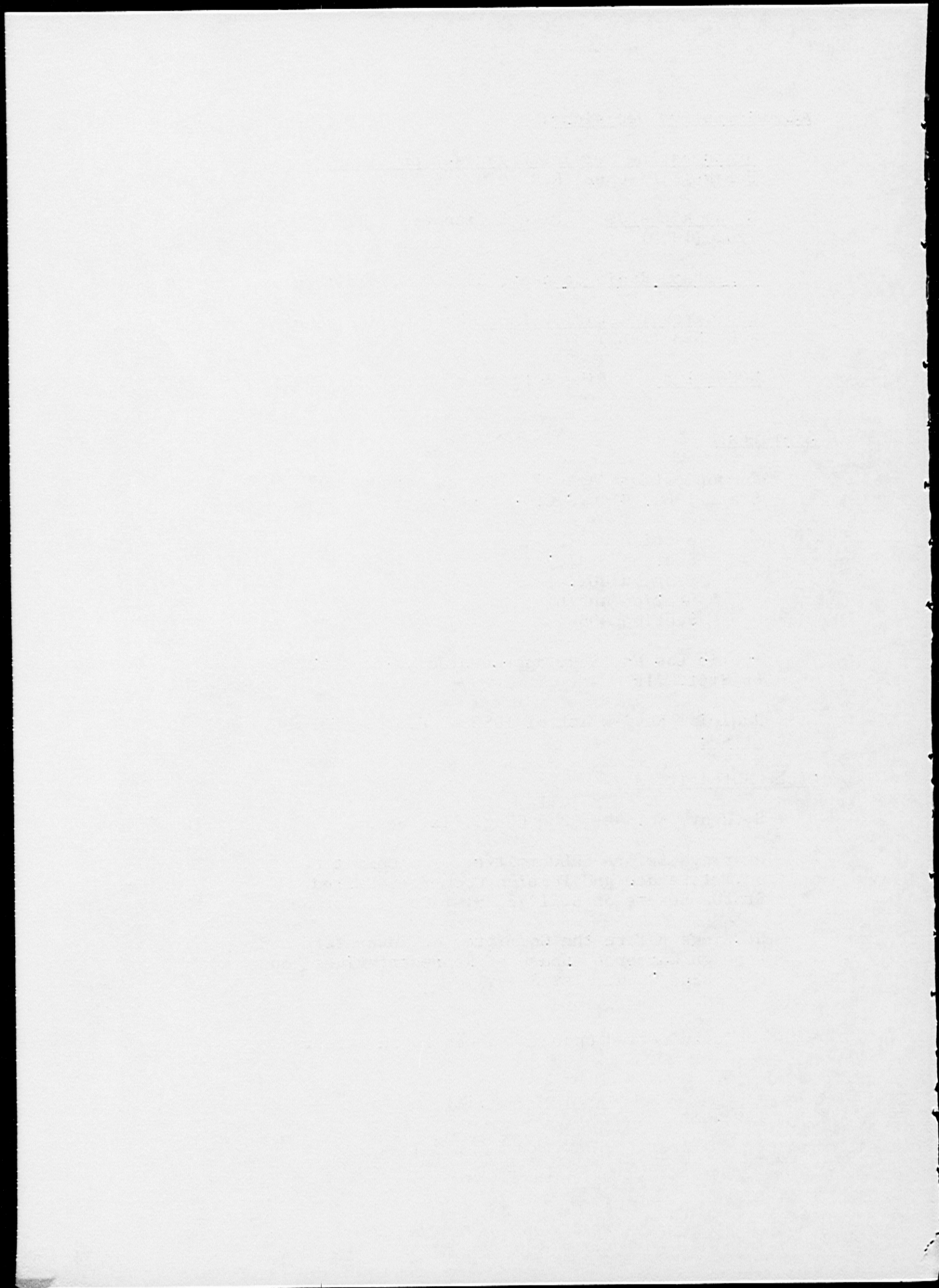
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IN THE UNITED STATES COURT OF APPEALS
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Intervenor.

ON APPEAL FROM AND PETITION FOR REVIEW OF MEMORANDUM OPINIONS
AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE-RESPONDENTS

JURISDICTIONAL STATEMENT

In these cases, appellant-petitioner Jefferson Radio
Company, Inc. (Jefferson) seeks review of the dismissal without

hearing by the Federal Communications Commission of Jefferson's application to acquire by transfer the permit for standard broadcast (AM) station WIXI, Irondale, Alabama. Case No. 18,296 is an appeal brought pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), from three decisions of the Commission: (1) a Memorandum Opinion and Order released December 9, 1963 (R. 1132-1133), denying a petition for extension of the authorization for station WIXI, and stating that Jefferson's application was rendered moot by the Commission's previous denial of an application for license for station WIXI; (2) the Commission's Memorandum Opinion and Order released December 19, 1963 (R. 1144-1146), denying, inter alia, reconsideration of the December 9, 1963 decision; and (3) the Commission's Memorandum Opinion and Order released December 30, 1963 (R. 1246-1250), again denying reconsideration and dismissing Jefferson's assignment application. Case No. 18,297 is a petition for review filed pursuant to Section 402(a) of the Communications Act, 47 U.S.C. 402(a), and the Judicial Review Act of 1950, 5 U.S.C. 1031, et seq., of the same Memorandum Opinion and Orders.

Since Jefferson complains of the dismissal of its application for assignment of license, an action clearly reviewable under Section 402(b)(3) of the Communications Act, 47 U.S.C. 402(b)(3), the Section 402(a) petition should be dismissed. Rhode Island Television Corp. v. Federal Communications Commission, -- U.S. App. D.C. --, --, 320 F.2d 762, 766 (1963).

COUNTERSTATEMENT OF THE CASE

On October 12, 1960, the Commission granted an application of intervenor W. D. Frink, tr/as Jefferson Radio Company (Frink) for a construction permit for a new standard broadcast (AM) station at Irondale, Alabama. Jefferson Radio Company, 29 F.C.C. 873. Frink's application had been in a comparative hearing with a mutually exclusive application for modification of the facilities of station WEZB, Bessemer, Alabama, filed by The Bessemer Broadcasting Company, Inc., (Bessemer), which was principally owned by Dorsey E. Newman (R. 1209), who is a 50% owner of the appellant corporation (R. 1207). Before the Commission concluded the hearing, the applicants agreed that in return for a one-half interest in Frink's proposed station (WIXI), Bessemer would dismiss its conflicting application. However, to avoid conflict with the Commission's multiple ownership rules, the owner of WEZB would have to dispose of that station before exercising the right to acquire a half interest in station WIXI. Although appellant indicates that the Commission approved the sale of WEZB subsequent to the Commission's decision of October 12, 1960 in which the Commission granted Frink's application for a construction permit for station WIXI, approved the Frink-Bessemer merger agreement and dismissed the WEZB application (Br. 36), the fact is that the Commission approved the sale of WEZB on April 27, 1960 and the station was disposed of on May 5, 1960, prior to the Commission's final approval of the merger agreement on October 12, 1960.

See Jefferson Radio Company, 29 F.C.C. at 876, note 2.

In its October 12, 1960 opinion, the Commission reviewed the terms of the merger agreement between Frink and Bessemer in order to determine if there was anything "about the arrangements and contemplated transactions between the parties which would reflect adversely" upon them (29 F.C.C. at 876-877). The Commission concluded that no adverse finding was warranted and accordingly approved the agreement and granted Frink's application, dismissing the Bessemer application. It may be noted here that only an option to secure a one half interest in station WIXI was involved, which might or might not be exercised, and the exercise of which would be subject to Commission approval. (29 F.C.C. at 877).

After the Commission granted Frink's application for a construction permit, he filed on November 25, 1960 an application for license to cover his permit (R. 1-12). See Section 319(c) of the Communications Act, 47 U.S.C. 319(c). However, by that time new questions had arisen with respect to Frink's qualifications to be a licensee which prevented the Commission from finding that a grant of Frink's license application would be in the public interest (R. 14). On December 28, 1961, the Commission designated the license application for hearing to determine whether Frink had transferred control of his station in contravention of Section 310(b) of the Communications Act, 47 U.S.C. 310(b), had filed documents with the

Commission that contained misrepresentations of fact, and had failed to file certain documents required by the Commission's rules (R. 13-16)^{1/}.

In the meantime, on January 10, 1961 an application had been filed with the Commission (R. 1199-1245) requesting Commission consent to the assignment of Frink's construction permit to a corporation jointly owned by Frink and the appellant; this application sought to effectuate the merger agreement between Frink and Bessemer. The Commission took no action on the assignment application at that time.

The hearing on Frink's application for license was concluded on August 8, 1962 (R. 311), and on December 4, 1962 the hearing examiner released his Initial Decision, concluding that Frink's application for license should be denied (R. 309-339). The examiner found (R. 330) that Frink had on two occasions transferred control of his station in violation of Section 310(b) of the Communications Act, had demonstrated a continual "lack of candor in dealing with the Commission," and had failed to report certain agreements to the Commission, in violation of the Commission's rules. In a decision released on September 13, 1963 (R. 772-774) the Commission adopted the examiner's Initial Decision.

Following the release of the Commission's decision, and

^{1/} In addition to Frink's application for license, the hearing included an application for a new standard broadcast station at Centreville, Alabama, that had been filed jointly by Frink and one Fred H. Davis. Subsequently, the Commission permitted Frink to withdraw from the Centreville application, whereupon it was removed from the hearing (R. 117-118).

a Memorandum Opinion and Order on December 2, 1963 denying reconsideration (R. 1111-1114), the appellant entered the proceeding for the first time. Together with Frink, it filed a Petition for Extension of Authorization (R. 1116-1121) in which they stated that Frink intended to withdraw completely from the appellant corporation. They requested that Frink be permitted to operate his station until an appropriate amendment to the assignment application was prepared and submitted to the Commission. Appellant, by itself, also filed a petition for reconsideration of the Commission's denial of Frink's application for license and a request for a stay of the Commission's decision.

In a Memorandum Opinion and Order released on December 9, 1963 (R. 1132-1133) denying the Petition for Extension of Authorization, the Commission held that the denial of Frink's application for license rendered the appellant's application for assignment of Frink's construction permit moot. The Commission stated, "for this reason any subsequent amendment to the application for assignment will not be accepted for filing" (R. 1132).

Thereafter, on December 19, 1963, the Commission released a Memorandum Opinion and Order (R. 1144-1146) denying appellant's petition for stay and reconsideration. The Commission concluded (R. 1145) that appellant presented no matters "not fully considered by the Commission in the Memorandum Opinion and Order of December 9, 1963."

Appellant filed still another Petition for Reconsideration on December 27, 1963 (R. 1153-1171). In this petition, the Commission was requested, inter alia, to permit the amendment of the application for assignment of Frink's construction permit to show the withdrawal of Frink from the appellant corporation and to designate the amended application for hearing. This petition was denied in a Memorandum Opinion and Order released December 30, 1963 (R. 1246-1250). The Commission concluded that the application for the assignment of the Frink construction permit was contingent upon Frink having a valid permit to assign, and that since the Commission had denied Frink's application for license, thereby terminating his construction permit, there was no valid authorization in existence which Frink could transfer.

SUMMARY OF ARGUMENT

The Commission properly dismissed without hearing appellant's application for assignment of Frink's construction permit, since after the Commission denied Frink's application for license there no longer was an authorization that could be assigned. The Commission also properly considered Frink's application for license before acting on appellant's assignment application. Under the Commission's long-standing policy, no action is taken on an application for assignment where questions as to the qualifications of the assignor are present. Appellant, clearly on notice of the course and consequences of the proceeding on Frink's license application, did not object.

ARGUMENT

I. The Commission Properly Dismissed Without Hearing Appellant's Application To Transfer The Permit For Station WIXI.

The appellant argues that the Commission erred in dismissing without hearing its application for assignment of the construction permit for station WIXI, and in not permitting the application to be amended to show Frink's surrender of all interest in the proposed transferee. This argument, however, fails to recognize the crucial fact that Frink no longer held a permit susceptible of transfer by him.

When the Commission denied Frink's application for license to cover his construction permit, Frink's authority to operate station WIXI was thereby terminated. Frink no longer held any authorization which he could assign.^{2/} A hearing on appellant's transfer application was therefore not necessary, since the foundation of the application had disappeared. Bendix Aviation Corp., Bendix Radio Div. v. Federal Communications Commission, 106 U.S. App. D.C. 304, 272 F.2d 533, cert. den. Aeronautical Radio Inc. v. United States, 361 U.S. 965 (1960). See also Transcontinent Television Corp. v. Federal Communications Commission, 113 U.S. App. D.C. 384, 308 F.2d 339 (1962); Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954). As this Court stated in affirming the Commission's dismissal of an application without hearing in Bendix

^{2/} Appellant does not contend that the Commission's denial of Frink's application for license was not justified, and no appeal has been taken from that action.

(106 U.S. App. D.C. at 308, 272 F.2d at 537):

"...the Commission's action was not in degradation of the Act...for [the] frequency...simply was no longer available for any such purposes as was designated by the...application."

Nor was the Commission's dismissal of appellant's application improper because appellant filed its application before the Commission designated Frink's application for license for hearing. It is the Commission's policy not to consider an assignment of broadcast authorization until it has determined that the assignor has not forfeited the authorization. See e.g., Broadcasting Service Organization, Inc., 3 Pike & Fischer, R.R. 979, 944 (1947), affirmed Federal Communications Commission v. Broadcasting Service Organization, Inc., 337 U.S. 901 (1949), reversing 84 U.S. App. D.C. 152, 171 F.2d 1007; G. A. Richards, 5 Pike & Fischer, R.R. 1292, 1294 (1950); Tidewater Teleradio Inc., 24 Pike & Fischer, R.R. 653, 657 (1962). This policy is clearly sound, and well within the Commission's discretion in administering the Communications Act. As the Commission stated in Tidewater Teleradio, Inc. (24 Pike & Fischer, R.R. at 657):

The Commission has long held that a licensee cannot act improperly in the broadcast field and, when challenged simply sell his station at a profit or without a loss; if this were permitted, such a licensee would have little reason to obey the Act, the Commission Rules or policies, or serve the public interest, since the worst that would happen to him is that he might have to sell his station. . . .

The Commission's policy has been made known to Congress.^{3/} Although Congress in 1952 amended Section 310(b) of the Communications Act, 47 U.S.C. 310(b), to prohibit the Commission from considering whether the public interest might be better served by an assignment to someone other than the proposed assignee,^{4/} the Commission's policy of considering the qualifications of the assignor was left undisturbed. Indeed, the Senate committee report on the amendment was careful to state that, "it should be emphasized that the Commission's authority to see to it that stations are operated in the public interest. . . is not impaired or affected in any degree by this subsection." S. Rept. No. 44, 82nd Cong., 1st Sess. p. 9.

Therefore, although appellant's application for assignment was filed with the Commission at about the same time as Frink's application for license, the Commission's procedure was to consider first Frink's application for license and, during the period of such consideration, defer any action on appellant's application for assignment. If, as we have shown, the Commission could first determine whether Frink was qualified to be given a license, the inevitable result of a denial of the license application would be that Frink would have nothing to assign. Appellant was clearly on notice, and made no

^{3/} See Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, on S. 658, 82nd Cong., 1st Sess., p. 97; Hearings Before Subcommittee of a Committee on Interstate and Foreign Commerce, United States Senate on S. 1973, 81st Cong., 1st Sess., p. 36.

^{4/} Public Law No. 554, approved July 16, 1952, 66 Stat. 716.

objection to the failure of the Commission to add its assignment application to the pending hearing. Indeed, appellant has not challenged upon appeal the Commission's denial of Frink's license application. The license for the station has thus returned to the Commission, and is available for a new application by any party but not for assignment by the party from whom it was taken back by the Commission.

Appellant claims that the Commission should nevertheless have permitted the assignment application to be amended to show the removal of Frink in order to "exhaust all possible avenues. . . before requiring complete destruction" of appellant's interest. Churchill Tabernacle v. Federal Communications Commission, 81 U.S. App. D.C. 411, 415, 160 F.2d 244, 248 (1947). Appellant's reliance upon this Court's decision in Churchill Tabernacle is misplaced.

In that case, after having continually approved over a period of more than ten years a provision in a contract between a broadcast licensee and the Churchill Tabernacle reserving time on the station for the church, the Commission suddenly reversed itself, found the contract to be contrary to the public interest, and ordered its immediate cancellation. This caused serious injury to the Churchill Tabernacle which, during the time the contract had been in effect, had made substantially non-recoverable investments. In reversing the Commission, the Court pointed out that some alternative consistent with the public interest other than immediate cancellation of the contract might be possible.

Even assuming that appellant could surmount the hurdle presented by the unappealed denial of a license to Frink, the Churchill Tabernacle decision would not help it. For, the equities which moved this Court in Churchill Tabernacle are not present here. In the present case, the Commission's dismissal of appellant's assignment application was not inconsistent with years of prior Commission action with respect thereto. Nor can appellant claim that it acted to its detriment in reliance upon any such Commission action.^{5/}

In requesting that the Commission reconsider its termination of Frink's broadcast authorization so as to permit an assignment, the appellant addressed itself to the discretion of the Commission. Section 405 of the Communications Act of 1934, as amended, U.S.C. 405. Clearly, the Commission's determination to adhere to its policy of not permitting assignments by unqualified licensees did not constitute an abuse of that discretion.^{6/}

^{5/} As we have shown (supra. p. 3), appellant sold station WEZB in Bessemer before the Commission approved the merger agreement, so it cannot be said that any action may be taken in reliance upon the Commission. And, of course, even if the Bessemer station had been assigned after the approval of the merger agreement, it would have been on appellant's own judgment to exercise its option, not on the Commission's "encouragement."

Appellant's allegation (Br. 13) that the Commission was inconsistent in permitting the amendment of the application for a new station at Centreville, Alabama, to show the withdrawal of Frink, is not well taken. For, there the Commission was not permitting a licensee to assign an authorization he had been held unqualified to possess. The Commission had given Frink no authorization for Centreville, and it merely permitted his withdrawal from a pending application for a construction permit. The record shows that after the Centreville application was amended, it was returned to the processing line (R..309).

^{6/} See also the concurring opinion of Commissioner Jett in WOKO, Inc., (cont'd)

CONCLUSION

For the foregoing reasons, the Commission's Memorandum Opinions and Orders should be affirmed.

Respectfully submitted,

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The United States of America, respondent in Case No. 18,297, agrees with the jurisdictional statement, and therefore takes no position on the merits.

Respectfully submitted,

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¹⁴
April 24, 1964

6/ (cont'd) 3 Pike & Fischer, R.R. 1061, 1068, where he agreed that WOKO, Inc., which had been found unqualified to be a licensee should not have been permitted to continue to be a licensee as a result of a reorganization designed to eliminate from the organization the person who had engaged in the conduct leading to the corporation's disqualification. Commissioner Jett stated: "the pending proposal looking toward the reorganization of WOKO or any other proposal which one or more of the present employees and/or stockholders of WOKO, Inc. desire to be considered should be embodied in an application for a construction permit."

REPLY BRIEF FOR APPELLANT-PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,296

JEFFERSON RADIO COMPANY, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

W. D. FRINK, tr/as JEFFERSON RADIO COMPANY
PERMITTEE OF STATION WIXI, IRONDALE, ALABAMA,

Intervenor.

Appeal From the Federal Communications Commission, United States Court of Appeals
for the District of Columbia Circuit

FILED APR 28 1964

No. 18,297

Nathan J. Paulson
CLERK

JEFFERSON RADIO COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA
AND FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

W. D. FRINK, tr/as JEFFERSON RADIO COMPANY
PERMITTEE OF STATION WIXI, IRONDALE, ALABAMA,

Intervenor.

Petition for Review of Order
of the Federal Communications Commission

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REPLY BRIEF FOR APPELLANT-PETITIONER

ARGUMENT

Appellant's contention in this proceeding is that its application for assignment was dismissed by the Commission without having been previously considered on the merits. Furthermore, Appellant was denied the right to amend its application to remove the cloud presented by Mr. Frink, although another applicant before the Commission in a similar situation was allowed to amend, resulting in a grant of that application.

The Commission defends its action principally on the theory that an assignment application cannot be considered if the authorization to be assigned has been forfeited. The Commission precedents for this principle turn on the disposal of a facility by sale after the assignor is on notice that his license is in jeopardy. Broadcasting Service Organization, Pike & Fischer RR 979 (1947), affirmed Federal Communications Commission v. Broadcasting Service Corporation, Inc., 337 U.S. 901 (1949); G.A. Richards, 5 Pike & Fischer RR 653 (1950). In the instant proceeding, Appellant's application for assignment was filed well before there was any indication that Mr. Frink had possibly done anything improper.

Other precedents cited by the Commission to substantiate its position relate to the deletion of a frequency before it was applied for, or the re-allocation of a frequency. Bendix Aviation Corp., Bendix Radio Div. v. Federal Communications Commission, 106 U.S. App. D.C. 304, 272 F.2d 533, cert. den. Aeronautical Radio, Inc. v. United States, 361 U.S. 965 (1960); Transcontinent Television Corp. v. Federal Communications Commission, 113 U.S. App. D.C. 384, 308 F.2d 399 (1962); Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954). These cases have no bearing on the instant proceeding since they are outgrowths of rulemaking proceedings or similar actions. In any event, they do not involve the complete usurpation by the Commission of established rights.



Appellant respectfully submits the Commission has failed to show why the basic principle of the Churchill Tabernacle case is not applicable to the instant proceeding. Churchill Tabernacle v. Federal Communications Commission, 81 U.S. App. D.C. 411, 160 F.2d 244 (1947). In that case this Court found the Commission should make every effort to protect the established rights of a party before taking a step which would summarily destroy those rights. Here the Commission dismissed Appellant's application after Mr. Dorsey Eugene Newman had sold his radio station in order to comply with Commission Rules and an outstanding merger agreement and had dismissed his competing application for construction permit only to find that he is to be denied access to the operating authority of the station applied for because of the improprieties of another party. Moreover, he has been denied the right to amend the pending application of Appellant to eliminate Mr. Frink although the Commission granted another applicant that very privilege. Appellant submits the Commission's actions in this case have effectively denied its rights.

Respectfully submitted,

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April 27, 1964